No. 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of A. F. YOST,

Plaintiffs,

vs.

L. E. DIXON COMPANY, *et al.,*

Defendants.

L. E. DIXON COMPANY, a corporation,

Cross-Complainant,

vs.

VAN HARRIS, an individual doing business as HARRIS & SONS, *et al.,*

Cross-Defendants.

UNITED STATES, to the Use of PARAMOUNT TRUCK RENTAL, INC.,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *et al.,*

Defendants.

Reply Brief of Appellant, Paramount Truck Rental, Inc. Re Attorneys' Fees.

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Reply Brief of Appellant, Paramount Truck Rental, Inc. Re Attorneys' Fees.

Appellant and Use Plaintiff, Paramount Truck Rental, Inc., has carefully read and considered the arguments and authorities contained in the Reply Brief of Appellees, Fidelity and Deposit Company of Maryland and L. E. Dixon Company, on the issue of at-

torneys' fees and finds nothing contained therein which requires it to change or withdraw from any of the positions asserted in its Opening Brief.

There is, however, one point raised in said Reply Brief that requires answering. Appellees take the position that this Honorable Court is bound by the decision of an intermediate California Appellate Court rendered in *B. C. Richter Contracting Co. v. Continental Casualty Co.,* 230 Cal. App. 2d 491, 41 Cal. Rptr. 98 (1964). Thus, appellees state that said decision "has . . . rendered the question [of whether Miller Act attorneys' fees are awardable under California law] academic . . ." (Reply Br. p. 7, second full paragraph, lines 5 and 6) and, again, that the *Richter* decision "conclusively prohibits such an award under California law." (Reply Br. p. 10, lines 7-8.)

But in so arguing, appellees completely misconceive the nature of the power and duties of a federal court in construing a *federal statute,* such as the Miller Act.

The leading opinion on this question is by Mr. Chief Justice Stone in *Sola Elect. Co. v. Jefferson Elect. Co.,* 317 U.S. 173, 87 L. Ed. 165 (1942).

Justice Stone wrote there as follows:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487.

> There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. [citing numerous authorities] When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."

This honorable court has recognized and applied this principle in the recent case of *Bard v. Koerner,* 279 F. 2d 623 (1960) where in an opinion by Judge Barnes, it is stated:

> "There is no question but *that in diversity cases* the rule of *Erie R. Co. v. Tompkins* . . . requires the federal courts to ascertain and follow what the State law is if the State decisions are sufficiently conclusive, definite and final. *But the Erie rule excepts 'matters governed by the Federal Constitution or by Acts of Congress'."* (279 F. 2d at 627 Emphasis supplied.)

Accord:

> *United States v. United Airlines, Inc.,* 216 F. Supp. 709, 720 *(E.D. Wash. 1962);*

Silas Mason Co. v. Tax Comm., 302 U.S. 186, 82 L. Ed. 187 (1937);

1a *Moore's Federal Practice,* Sec. 0.183 *et seq.;*

54 Am. Jur., *United States Courts,* Section 352;

20 Am. Jur. 2d, *Courts,* Sections 222 and 208; and

59 Harv. L. Rev. 956.

And pursuant to this principle, this court has thus recognized on more than one occasion that *federal law* must be applied in the interpretation and construction of the Miller Act. See *Continental Casualty Co. v. Schaeffer,* 173 F. 2d 5 (9th Cir. 1949); *Liebman v. California Electric Supply Co.,* 153 F. 2d 350 (9th Cir. 1946). And the authorities reviewed above demonstrate that in formulating this federal law, federal courts are *not* bound by a State court's characterization of the scope and effect thereof.

Conclusion.

Paramount reiterates the conclusion contained in its Opening Brief that the court below erred in determining that it is not permitted either under the Miller Act itself or under California law to award attorneys' fees to Paramount, the prevailing use plaintiff herein. As demonstrated herein, this court is not bound by nor should it follow the narrow and restricted interpretation placed on the Miller Act by the State court judge in the *B. C. Richter case.* Rather in furtherance of the purposes of the Miller Act, it should follow and adopt the

more liberal and better reasoned analysis of District Judge East in *United States v. Reliance Insurance Co. of Philadelphia, Pa.*, 227 F. Supp. 939 (D. Mont. 1964), which analysis is supported by other decisions, including this court's opinion in *Macri,* digested at pages 9 and 10 of Paramount's Opening Brief.

Respectfully submitted,

GREENBERG, & GLUSKER,
By RICHARD H. FLOUM,
Attorneys for Appellant, Paramount Truck Rental, Inc.

Certificate.

I certify that, in connection wtih the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD H. FLOUM